IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6652 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHHOTALAL KALIDAS

Versus

ENGLISH TALKIES

Appearance:

MR TR MISHRA for the Petitioner-absent.

MR HB SHAH for the Respondent-absent.

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 21/06/2003

ORAL JUDGEMENT

List has been revised. None appears on behalf of the petitioner to press this petition. In the present case, affidavit-in-reply has been filed by the respondent and material facts have already been placed on

record and hence this petition being old one, can be decided on the basis of the facts and circumstances and material on record. This petition is therefore, being disposed of finally.

2. The petitioner was working as Munim from April, 1958 in the respondent theatre and his services were terminated on 8.10.1976. The petitioner filed a recovery application being Recovery Application no. 3820 of 1997 to recover his dues from the respondent. By means of this petition, the petitioner has sought for quashing and setting aside the impugned judgment and order dated 27th March, 1991 being illegal and contrary to the facts of the record and for a declaration to hold that the petitioner is a workman within the meaning of section 2(s) of the Industrial Disputes Act, 1947 and for a direction to the respondent to remand the matter to the Labour Court, Ahmedabad to dispose of the case of the petitioner on merits within a stipulated period.

3. Recovery Application no. 3820 of 1977 was rejected by the Presiding Officer of the Labour Court vide order dated 27th March, 1991. According to the petitioner, the Labour Court has held that the petitioner is not a workman within the meaning of section 2(s) of the Industrial Disputes Act, 1947. The findings recorded by the Labour Court are perverse contrary to the facts and circumstances on record and against well settled principles of law. Hence, they are required to be set aside. The Labour Court has erroneously held that the petitioner is not a "workman" within the meaning of section 2(s) of the Industrial Disputes Act and hence the application cannot be filed. The Labour Court erroneously held otherwise, particularly in the facts and circumstances that the respondent himself in his deposition stated that the petitioner was working as Munim and the respondent was a partner of the theatre and has clearly stated that the petitioner was working on contract basis for writing the books and he was writing the cash books and ledgers. The petitioner was initially paid a sum of Rs. 50/- by way of salary. Subsequently, he was being paid Rs. 200/-, then Rs. 220/- p.m. The Labour Court has failed to appreciate the fact that the petitioner was writing books of accounts and ledger and cash book which is not in dispute between the parties and the job of the petitioner was of clerical nature. It is a contract of employment and not a contract for employment. The petitioner was not performing any supervisory, managerial or in administrative capacity and admittedly, the petitioner was drawing salary of less than Rs. 1600/- which is a limit prescribed under

section 2(s) of the Industrial Disputes Act. The learned Judge has not considered the settled legal position as held by the Supreme Court in the case of Dhrangadhra Chemicals Works Ltd. in which it is required to establish relationship of employer and employee must necessarily vary from business to business. The correct method of approach would be to consider whether having regard to the nature of work, there was due control and supervision of the employer. The fact that the person was engaged or paid on piece rated basis and that they could employ their own labour and pay for it and that could be considered to be decisive factor to hold them as independent contractor when the employer had power of supervision and control at all stages of the work from the beginning to end. The Supreme Court has also held that there is an abundant authority that a person can be a workman eventhough he is paid not per day but by the job. If a person agrees himself to work and does not work and is therefore, a workman does not cease to be such by reason merely of the fact that he gets other persons to work alongwith him and that these persons are controlled and paid by him if he takes assistance from other persons could not affect his status. In view of the observations made by the Labour Court, the workman was working as a Munim, writing cash books, books of accounts etc. for which he was paid a sum of Rs.220/-. The respondent has not produced any material to show that the petitioner was not a workman within the meaning of section 2(s) of the Industrial Disputes Act. The Supreme Court in another case of Bhagaband Colliery and their workmen has held that evidence on record discloses that the Sirdars even in regard to their supervisory work over the miners recruited through them were treated as employees by the collieries and not independent contractors. They must be regarded as workmen employed by collieries even in respect of such supervisory work performed by them. All remuneration capable of being expressed in terms of money payable to the workmen in respect of his employment for the work done in such employment would mean wages. The commission paid to Sirdars being expressed in terms of money fell within the definition. The sirdars being such workmen even on their capacity as supervisor and being in respect of wages a dispute connecting the payment of wages to them can fall in entry-1 to the schedule III of the Act and hence reference for such dispute by the Central Government was competent. In another case being D.C.Diwan Mohinder Sahib and sons and others vs. United Beedi Workers Union, the Supreme Court has held that a review of entire evidence in the instant case the Industrial Tribunal found that the system of Beedi manufacturing through

so-called intermediary styled as "contractors" was a mere camouflage device by the beedi manufacturers. The Tribunal found that the so-called contractors were the indigent persons and sere no particular duties and discharge no special function. The raw materials were furnished by the manufacturers to be manufactured into finished product by the workmen of the contractor has no other function except to take raw material to the workmen and collect the manufactured material. Hence, it was held that the so-called contractors were not independent contractors and they remained employees and were functioning as Branch Managers of various factories. Being dependent upon the work turned out and hence it held that the beedi rollers were the employees of beedi manufacturer and not as so called independent contractors.

4. The respondent Husenbhai has filed affidavit-in-reply as ex-partner of the partnership firm which was running the theatre English talkies. It is stated therein that the petitioner filed Recovery Application no. 3820 of 1977 before Labour Court claiming payment of salary, gratuity, retrenchment compensation, difference in salary, wages for EL, bonus etc., totalling Rs. 5886.25 ps. wherein before the Labour Court, he has stated that he was working as Munim since 1.4.1958 and was getting Rs. 200/- per month and his services were terminated with effect from 8.10.1974. He was not paid any amount of his legal dues and hence he made the aforesaid claim. Before the Labour Court, the respondent filed its reply stating therein that in the respondent establishment, about 16 or 17 employees were working. Bonus Act was not applicable to the respondent and the applicant was serving on the contract basis. Accordingly, he used to come hardly once or twice in a month for writing accounts and the applicant was doing some type of work in other institutions. Therefore, he never worked as a workman and an employee of the respondent establishment. Hence he is not an employee. In fact, the petitioner had worked upto March 1976 for writing accounts and thereafter he did not work at all. So, the respondent establishment has paid him agreed amount upto September, 1976 and he stopped coming thereafter and no relationship of employer and employee was established. The petitioner also filed another Recovery Application no. 3533 of 1987. In the oral evidence at exh. 21, the petitioner stated that he was getting Rs.220/- per month as salary and he used to work from 10.00 a.m. to 12.00 midnight. He was also doing the work of booking clerk and his services were terminated from 8.10.1976. He admitted that his name was

not entered into the attendant register, i.e. muster roll. He admitted that ticket booking work was being done by one Mansurbhai and Iqbalbhai and he was required to write daily accounts and ledger. He also admitted that apart from that application, he also filed another application in the Labour Court. In the second application, he also asked for difference in salary and D.A. He also stated in the cross-examination that he never made any complaint or application to any Inspector or Government Labour Officer. In the cross-examination, he has also admitted that it was true that he used to go to write accounts once in a week and he used to write accounts of Suren and Company. It is also admitted that for the gratuity amount, he filed another application before the concerned authority. After termination of his services, he has not preferred any case against the establishment for reinstatement and he has not made a complaint to the Inspector under Shops and Establishment Act. The establishment examined witness Hussenbhai Abbasbhai who was the partner of the establishment. He stated that the applicant used to do work of writing accounts on lumpsum contract basis and he used to come hardly once or twice in a week or 10 days in a month. The applicant used to write accounts at his home. The applicant had never worked as a booking clerk.

5. After hearing the parties, the Labour Court came to the conclusion that the applicant had never worked as an employee or booking clerk of the establishment and it could not be established by documentary as well as oral evidence. The Labour Court has also taken into account that the petitioner was working as an accountant. The Labour Court found the contradictory statement of the petitioner that he was working as a booking clerk and came to the conclusion that he used to write accounts of the establishment and in the respondent theatre, there was only one booking office for all classes and in the booking office, Ikbalbhai and Mansurbhai were working and the petitioner had never worked as a booking clerk. The petitioner's name was not found in the muster roll and his presence was not marked in such muster roll wherein attendance of other persons were being marked. As such, the Labour Court came to the conclusion that the petitioner had never worked as a booking clerk and he was not an employee of the respondent establishment. The Labour Court also found that if the petitioner was doing work from 10.00 a.m. to 12.00 midnight in that case, he was not in a position to work as full time accountant in another institutions. Hence, his case was found falsified on the basis of the material and evidence of

the petitioner himself. Whenever any amount was paid to the petitioner, receipt was obtained as the petitioner was not an employee. Therefore, he was not entitled to claim anything from the respondent.

6. As stated in the affidavit-in-reply that the theatre has been closed down in the year 1985. That was sold to some other party and in that place, one shopping complex has been constructed. The partnership has also been dissolved and it is not in existence today.

7. I have considered the entire facts and circumstances of the case and have also perused the relevant papers on record. As the petitioner could not make out a case that he was a workman within the meaning of section 2(s) of the Industrial Disputes Act, as the petitioner himself has admitted to have worked as Munim and he used to go to the respondent establishment once in a week and the amount was paid to the petitioner on the contract basis. As such, the petitioner was not paid salary and that was only an amount on the basis of the contract. The petitioner was also working as a Munim in other institutions. Therefore, the petitioner cannot be termed as a workman working in the respondent establishment. Considering the facts and circumstances, I do not find any good reason calling for interference by this Court. Accordingly, the petition is dismissed. Rule discharged with no order as to costs.

...

***darji